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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-835

JOHN M. PETTIBONE, DIRECTOR, DIVISION OF PAROLE AND PROBATION, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES,

Petitioner,

v.

KENNETH WOODALL, #B-1-103228,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

FRANCIS B. BURCH,
Attorney General of Maryland,

EDWARD F. BORGERDING,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,

JOHN P. STAFFORD, JR.,
Assistant Attorney General
of Maryland,

DAVID H. FELDMAN,
Assistant Attorney General
of Maryland,
One South Calvert Street,
Baltimore, Maryland 21202,
(301) 383-3737,

Counsel for Petitioner.

The Daily Record Co., Baltimore, Md. 21203

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I.

On page 1 of his Brief in opposition to certiorari Respondent, in commenting on Petitioner's statement of the case, alleges for the first time ever that, with respect to the exhaustion of state judicial remedies question, "the State fails to point out that respondent filed first in Federal court pursuant to oral agreement with the State of Maryland to follow that procedure." Counsel for Petitioner are informed by Respondent's counsel that this statement relates to an alleged agreement between Respondent's counsel and a former Assistant Attorney General of Maryland who previously represented Petitioner.

The statement quoted is clearly incorrect. Therefore, Petitioner calls the Court's attention to two affidavits executed

by that former Assistant Attorney General which demonstrate this fact and which are printed as appendices A and B hereto.[1]

II.

Petitioner also wishes to call the Court's attention to the fact that Respondent alleges at page 1 of his Brief in opposition to certiorari that the question presented is as follows: "Should a decision which, on constitutional grounds, deprives a court of subject matter jurisdiction over a certain class of cases and which, as to those same cases, impugns the integrity of the dispositional phase of the criminal process, be applied retroactively?"

Although Petitioner does not agree with Respondent's presentation of the question presented and believes that the questions presented as outlined in the Petition properly state the issues in this case, Petitioner notes that the question as phrased by Respondent is substantially identical to the question presented in two cases currently pending in this Court: namely, *Warner v. Flemings*, No. 71-1398, and *Gosa v. Mayden*, No. 71-6314, both argued December 4, 1972. These cases concern the retroactivity of *O'Callahan v. Parker*, 395 U.S. 258 (1969). Even though the United States Court of Appeals for the Fourth Circuit did not base its decision below on a resolution of the question now presented by Respondent, Respondent did argue this question in that court both in his principal brief[2] and in his reply brief.[3]

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[1] Petitioner originally sought to bring this information to the Court's attention by letter to the Clerk dated January 10, 1973, but counsel for Petitioner were advised by the Clerk's office that such matters should properly be submitted in a petitioner's reply to respondent's brief in opposition.

[2] *See* Brief for Appellant at 53-56, a copy of which Brief has been lodged with the Clerk of this Court together with the certified record.

[3] *See* Reply Brief for Appellant at 24-34, a copy of which Reply Brief has also been lodged with the Clerk of this Court.

Your Petitioner does not believe that Respondent's case poses the question presented by Respondent[4] but suggests that if it does, the fact that two cases pending in this Court, *Warner* and *Gosa*, present substantially the identical question[5] is further demonstrative of the importance of the questions raised by the Petition and should compel the granting of certiorari in this case as well.

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[4] *See* Brief of Appellee-Cross Appellant, in the Fourth Circuit, at 37-43, a copy of which Brief has also been lodged with the Clerk of this Court.

[5] As pointed out by Respondent in his opposition to Petitioner's motion for stay of mandate pending application for certiorari, filed in the United States Court of Appeals for the Fourth Circuit, a part of the certified record herein, at 10 n.10:

> "Moreover, it is likely that the Supreme Court, if it were inclined to grant certiorari, would hold the case in abeyance until it renders a decision in *Gosa v. Mayden*, which is now before it, following the granting of a Petition for Writ of Certiorari to the 5th Circuit. *See* 92 S.Ct. 2467 (1972). The *Gosa* case raises the issue of retroactivity in the context of absence of subject matter jurisdiction which was one of the two principal aspects of the retroactivity issue in the instant case. It would be unlikely that the Court would grant certiorari in other cases raising retroactivity issues until the relevance of its opinion in *Gosa* could be determined."

CONCLUSION

For the reasons stated above, as well as those stated in the Petition, Petitioner prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
EDWARD F. BORGERDING,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
JOHN P. STAFFORD, JR.,
Assistant Attorney General
of Maryland,
DAVID H. FELDMAN,
Assistant Attorney General
of Maryland,
Counsel for Petitioner.

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APPENDIX A

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-835

JOHN M. PETTIBONE, DIRECTOR, DIVISION OF PAROLE AND PROBATION, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES,

PETITIONER,

v.

KENNETH WOODALL, #B-1-103228,

RESPONDENT.

AFFIDAVIT

STATE OF MARYLAND, CITY OF BALTIMORE, TO WIT:

I, ALFRED J. O'FERRALL, III, District Public Defender for Baltimore City, formerly an Assistant Attorney General of Maryland, at the request of the Office of the Attorney General of Maryland, do hereby make the following statements to supplement my affidavit executed May 11, 1972, which is attached hereto, with respect to my representation of Maryland's interests in *Woodall v. Pettibone*, 465 F.2d 49 (4th Cir. 1972), *rev'g*, 337 F. Supp. 595 (D. Md.), *petition for cert. filed*, 41 U.S.L.W. 3347 (U.S. Dec. 7, 1972) (No. 72-835):

I am informed that in Woodall's Brief in Opposition to Petition for a Writ of Certiorari filed herein, the new claim

is now made "that [Woodall] filed first in Federal court pursuant to oral agreement with the State of Maryland to follow that procedure"; and I am further informed that Woodall's counsel allege that I am the representative of the State of Maryland with whom the said oral agreement was made.

The claim that I agreed on behalf of the State of Maryland that Woodall should file his habeas corpus petition in federal court first is not true. I presently have no recollection of having spoken with Woodall's counsel about his case prior to the filing of his federal habeas corpus petition, but am certain that even if I did I made no agreement that Woodall should file his petition first in the federal court. If I had made such an agreement, I would affirmatively have waived exhaustion of state judicial remedies in the State's initial answer to the petition, in accordance with my uniform practice as set forth in my May 11, 1972, affidavit.

I hereby affirm, attest, and confirm that the foregoing statements are made by me on personal knowledge, and are true and correct to the best of my knowledge, information, and belief.

/s/ ALFRED J. O'FERRALL, III,
District Public Defender
for Baltimore City.

Subscribed and sworn to before me, a Notary Public of the State of Maryland, this 10th day of January, 1973.

/s/ JOAN F. WEBSTER,
Notary Public.

(Seal)

My Commission expires: July 1, 1974.

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APPENDIX B

STATE OF MARYLAND, CITY OF BALTIMORE, TO WIT:

I, ALFRED J. O'FERRALL, III, District Public Defender for Baltimore City, and formerly an Assistant Attorney General of Maryland, do hereby, at the request of the Office of the Attorney General of Maryland, make the following statements with respect to my representation of Maryland's interests in *Woodall v. Keller*, 337 F. Supp. 595 (D. Md. 1972), *appeals pending sub nom. Woodall v. Pettibone*, Nos. 72-1242 & 72-1264 (4th Cir.):

When I filed the Respondent's Answer on September 24, 1971, it was not my intention to then or later specifically raise the issue of whether Woodall had exhausted his effective state judicial remedies. My view of the case was that a true retroactivity question was not presented, but rather that the question raised was purely factual: namely, whether the allegedly unequally protective statutory scheme had a rational basis in fact at the time Woodall's offenses were committed. However, although it was not my intention to raise the exhaustion issue, it was definitely not my intention to waive on behalf of the State of Maryland its right to assert that defense. In the few cases where it had been my intention to specifically waive the exhaustion question, it was uniformly my practice to affirmatively do so in writing or otherwise of record. Therefore, although I did not plan to raise the exhaustion issue myself, as I did not specifically and affirmatively waive that question of record, I informed my successor Assistant Attorney General assigned to the case, and have subsequently informed Woodall's counsel, that my view was that the State of Maryland was free to raise the exhaustion issue in Woodall's case as it deemed appropriate.

I hereby affirm, attest, and confirm that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

/s/ ALFRED J. O'FERRALL, III,
District Public Defender
for Baltimore City.

Subscribed and sworn to before me this 11th day of May, 1972.

/s/ LOUISE P. HENNEBERGER,
Notary Public.

(Seal)

My commission expires: July 1, 1974.